

(2002) 07 MAD CK 0185
In the Madras High Court
Case No : A.S. No. 787 of 1986

B. Ramasubbu Chettiar (died), R. Bagavathiperumal, R. Dakshinamurthy, R. Ashok Kumar, Dr. R. Mohan Das, R. Venkatesh, R. Umayaparvathy and R. Radhakrishnan **APPELLANT**

Vs

N. Ganesan (died), Bahavathiperumal Chettiar, Chitharanjandas Chettiar, Ramadas, Sankararam, Rajammal, G. Murugan, Parameswari, Lilli Bai, Ambia and Akila **RESPONDENT**

Date of Decision : 30-07-2002

Acts Referred:

Limitation Act, 1908 — Article 10
Limitation Act, 1963 — Section 17
Transfer of Property Act, 1882 — Section 10

Citation : (2002) 3 LW 768

Hon'ble Judges : P. Shanmugam, J;K. Sampath, J

Bench : Division Bench

Advocate : V.K. Muthusamy, for K.M. Santhanagopalan and S. Thangavel, for the Appellant; C. Godwin, for O.K. Sridevi, (For R-1, R-3 and R-10), for the Respondent

Final Decision : Allowed

Judgement

P. Shanmugam, J.—Plaintiff is the appellant. The suit was filed for a decree of possession of the plaint schedule property by way of preemption and for redemption of the mortgage. On dismissal of the suit, the above appeal is filed.

2. The facts of the case are stated hereunder. The parties are described as per their rankings before the Subcourt. For better appreciation, the genealogy of the parties is given below :

Bagavathi Perumal _____|_____
| | | | Easwaramuthu Ramasubbu Krishnappa Sivadanu Chettiar Chettiar
Chettiar Chettiar (Plaintiff) | _____| | | |
Bhagawathi Ramadas Chitharanjandas Perumal Chettiar Chettiar Chettiar (4th
Defendant) (3rd (2nd Defendant) Defendant)

3. The suit property, an extent of 20 cents of land and building bearing M.C. No.515 comprised in Old Survey Number 1679/2740 belonged to the family of the plaintiff and defendants 2 to 4. Defendants 2, 3 and 4 are brothers. Their father, Late Sivadanu Chettiar and the plaintiff Ramasubbu Chettiar are brothers. The plaintiff, and his three brothers namely Sivadanu Chettiar, Easwaramurthy Chettiar and Krishnappa Chettiar have entered into a family partition, Ex.A.1 deed dated 25.3.1953. As per this partition deed, the plaintiff was allotted the "B" schedule properties, defendants 2 to 4 were allotted the "D" schedule properties. The suit property is Item 54 in the "D" schedule property. The said "B" and "D" items made up of 20 cents of land, building and gate portion within 20 cents. The plaintiff has been allotted a share in between the portions allotted to defendants 2 to 4. The plaintiff schedule property consists of portions of gate and portion of the building which lie on both sides of the plaintiff's share. In other words, the share of defendants 2 to 4 is not a single, separate plot or building. Therefore, the partition deed provided that if it was found necessary to sell either of these "B" or "D" schedule properties allotted to the plaintiff or defendants 2 to 4 to third parties, they must offer the same to the respective parties or their heirs. It is further found in the partition deed that Item 1 of the "B" schedule and Item 54 of the "D" schedule are now in the hands of the tenants and already proceedings were initiated under the Rent Control Act and the first party in the partition deed namely Easwaramurthy Chettiar had to continue the proceedings.

4. According to the plaintiff, he was already and willing to purchase Item 54 of the "D" schedule property as per the condition stipulated in the partition deed. However, without the knowledge of the plaintiff, defendants 2 to 4 had entered into an agreement to sell the plaintiff schedule property to the first defendant in collusion with an ulterior motive to deprive the plaintiff's right of preemption. He learnt that the second defendant had executed a fraudulent and invalid sale deed in favour of the first defendant in secrecy with a view to defeat the right of the plaintiff. The plaintiff came to know of the alleged agreement and the void sale deed only on 4.10.1980 when the Commissioner visited the property as per the ex parte decree obtained in O.S. No.43 of 1978. Immediately thereafter, the plaintiff filed an application to set aside the ex parte decree on 4.10.1980 and the said decree was set aside and the said order was confirmed by the Honourable Supreme Court. It is further averred that the schedule property in the said suit had been described in such a manner so as to deprive the plaintiff his due share as per the partition deed. The plaintiff further came to know that the sale consideration was Rs.90,000/- made up of the mortgage amount of Rs.21,000/-. The plaintiff states that he is prepared and is ready and willing to pay the amount and purchase the share of defendants 2 to 4 and is also prepared to clear off the mortgage outstanding. Hence the above suit.

5. The first defendant, purchaser of the suit property, in his amended written statement, denied all the allegations. According to him, the suit property is distinct from the property allotted under the "B" schedule; the clause of

preemption in the partition deed is void, invalid and opposed to public policy; the said clause is repugnant to the principles of the Transfer of Property Act and hence void; the first defendant had obtained a decree for specific performance in O.S. No.43 of 1978 when defendants 2 to 4 did not perform their part of the contract as per the agreement dated 6.12.1976; the plaintiff had full knowledge of the agreement and sale in favour of the first defendant; and subsequently, the second defendant on 4.8.1977, received a sum of Rs.29,100/- towards sale consideration and executed sale deeds in favour of the first defendant in respect of his share in the property. The first defendant also claimed that the suit is not maintainable in law and is barred by limitation as it is filed more than one year after 4.8.1977, the date of the sale deed in favour of the first defendant.

6. The fourth defendant had filed a written statement contending that the two portions belonging to the plaintiff as well as to him and his brothers can be enjoyed separately. The preemption clause is not enforceable and is void for vagueness and uncertainty. The rule of preemption is a special rule in Mohammedan Law and cannot be enforced as a rule consistent with equity and good conscience.

7. The fifth defendant, in his written statement, has stated that the total area comprised in the plaint is not 20 cents, but excluding the area acquired by the Railways, the balance is only about 15 cents and a building; of this extent, the plaintiff is entitled to one-half share and defendants 2 to 4 are entitled for the remaining one-half. According to him, he is not aware of the agreement of sale alleged to have been executed by defendants 2 to 4 and the sale deed executed by the second defendant and he is a tenant paying half the rent to the first defendant in his capacity as mortgagee and the other half to the plaintiff without any default.

8. On these pleadings, the issues framed and the findings rendered by the trial court are as follows :

Issue No.1 : Whether there is preemption right to the plaintiff ?

Finding : The plaintiff did not have the right of preemption to purchase the property from defendants 2 to 4.

Issue No.2 : Whether the sale agreement will bind the plaintiff ?

Finding : It will not bind the plaintiff.

Issue No.3 : Whether the property has been properly described ?

Finding : Yes, the property has been properly described.

Issue No.4 : Whether the suit is barred by limitation and is maintainable ?

Finding : The suit is barred by limitation and is not maintainable.

9. Learned senior counsel Mr. V.K. Muthusamy appearing on behalf of the appellants submitted that as per Clause 5 of the partition deed, the parties have

clearly intended to have a right of preemption as between the appellant and respondents 2 to 4 whenever the need arose for either of the sharers to part with their respective shares and the same is not an absolute restraint and is illegal or is in violation of Section 10 of the Transfer of Property Act. According to him, the trial court failed to see that excepting the evidence on behalf of the plaintiff's side, there is no contra evidence to rebut the clear case of the plaintiff; the plaintiffs were aware of the alleged agreement for sale and the sale deed which were void ab initio and illegal; the circumstances namely the non-issuance of notice and taking the sale deed at Kerala and keeping the execution of these documents silent and a secret till the filing of the written statement shows that there is a fraud committed by defendants 2 to 4 in collusion with the first defendant to deprive the rights of the plaintiff; the first defendant is not a bonafide purchaser for value and he was fully aware of the recitals in the partition deed and the right of the appellant to purchase the properties; the provisions of Article 97 of the Limitation Act cannot be applied; the first respondent, after having filed a suit based on Ex.A.3 including the appellant as the fifth defendant therein, subsequently gave up the appellant as a party to the said suit when the appellant put forward his right of preemption over the suit properties; hence, it is not open to the first respondent to contend that he should have filed the suit within one year from 4.8.1977, which date cannot be taken as the starting point for limitation; and the agreement of sale and the sale deed are void documents brought about by fraud and collusion.

10. Mr. C. Godwin, learned counsel appearing on behalf of the respondents pleaded that Clause 5 of the partition deed is an absolute restraint on transfer and is, therefore, illegal, besides being vague and uncertain. He further pleaded that the suit is barred by limitation.

11. We have heard the counsel, gone through the records and considered the matter carefully.

12. Defendants 2 and 3 remained ex parte before the trial court and did not file a written statement. The fourth defendant alone filed a statement and contested the matter. No oral evidence was let in on behalf of the first defendant, the purchaser and the fourth defendant, one of the other sharers.

13. There is no dispute in reference to the partition deed, Ex.A.1 dated 25.3.1953 entered into between the sons of Bagavathiperumal Chettiar. Clause 5 of the said partition deed reads as follows :

""A" schedule property is allotted to the first party; "B" schedule property is allotted to the second party; "C" schedule property is allotted to the third party; "D" schedule property is allotted to party nos.4 to 6 jointly. The above properties shall be enjoyed by the respective sharers absolutely. But, the parties who are allotted Item 1 of the "B" schedule property and Item 54 of the "D" schedule property shall enjoy the same without alienation. The value of Item of the "B" schedule property is mentioned as Rs.10,000/- and for Item 54 of the "D"

schedule property, it is shown as Rs.10,000/-. In case the second party, who has been allotted Item 1 of the "B" schedule property finds it necessary to sell it to third parties, the sharers enjoying Item 54 of the "D" schedule property namely party nos.4 to 6 or their heirs are entitled to get the sale of the property depending on the then market value of the property. Likewise, if need arises for the sharers of Item 54 of the "D" schedule property to sell the property to third party, they have to sell it to the second party or his heirs. While dividing the properties under Item 1 of the "B" schedule and Item 54 in the "D" schedule as described in the Schedule, if it is found necessary to construct a wall, the costs towards the same shall have to be shared one-half by the second party and the other half by parties 4 to 6."

A careful reading of the above said clause reveals that there is no absolute restraint on the right of alienation. The intention of the parties incorporating the said clause was to make the right of preemption available to both the parties and for the convenient enjoyment of the properties by all the sharers. The partial restraint attached to the property only says that in case the parties who have been allotted these items want to sell the same, they shall first offer it to the respective parties. Though the market value is fixed, the sale price will be keeping that amount as a guidance. Since the parties have understood that the price is likely to go up, it follows that if the respective parties are not willing to purchase the properties, it is open for them to go in for a third party. We must also remember that this is a partition arrangement made by the parties themselves and they must not be permitted to go back on their commitment.

14. The decisions referred to in this context can be now looked into :

In AIR 1944 187 (Nagpur) , the Allahabad High Court has held that in a family partition between two brothers, it is agreed that if any coparcener wished to sell his share in the residential house or if his share were sold in any other way, the other coparcener would be entitled to buy it for Rs.200/-; such an agreement is enforceable against the son of one of the parties to it. A Division Bench of the Kerala High Court, in VELAYUDHAN NAIR VS. NARAYANI AMMA AIR 1957 TC 156, has taken the view that where a partition deed states that in case any of the sharers desired to sell the share allotted to him (or her), it shall be sold to whomsoever among the other sharers who offers to purchase it. It is a limited restraint on alienation and is a valid restraint. In P.V.S. Vencatachellum Vs. P.V.S. Kabalamurthy Pillai, , a learned Judge of this Court has held that Sections 10 to 17 of the Transfer of Property Act have been enacted to encourage free alienation and circulation of property. However, entire transfers are not vitiated simply because there may happen to be some clauses in the deeds which are repugnant to the free transfer and circulation of property. u/s 10 of the Act, a condition absolutely restraining a transferee from disposing of the property is void and the section is wholly silent as to the validity of qualified restraints on alienation. A condition imposing a partial restraint on alienation is not void. Whether the restraint in a particular case is absolute or partial has to be gathered from the

intention of the transferor from the contents of the document. In *Jagar Nath Vs. Chhedi Dhobi and Others*, , a learned Judge of the Allahabad High Court, while dealing with a stipulation in the deed to the effect that if and when the vendee intended to dispose of the house, he should first offer the same for sale to the vendor or his heirs as the case may be and if they declined to purchase the same, the vendee would be entitled to sell the property to any third person at a reasonable price, held that it would not amount to an absolute restraint on the right of transfer. In *KANAKAMMAL VS. VAJJIRAVELU* 1985 1 M.L.J. 215, a learned Judge of this Court has held that it is well settled that the parties can agree to a clause whereby a right of preemption is created. In that case, the settlor, who was anxious that the property should not go out of the family as far as possible, incorporated a covenant in the deed that should any of his sons sell the property for necessity, he shall offer the same to any of his other sons according to the then prevailing market value. Such a clause of preemption will not be an absolute restraint on the rights of transfer. On the other hand, it is only a partial restraint. For instance, if none of the other sons is willing to purchase notwithstanding the offer made by the son who proposes to sell, he has an unfettered right to alienate the property to whomsoever he likes and therefore, it was only a partial restraint. In *Shivji Vs. Raghunath (dead) by L.Rs. and others*, , the Supreme Court held that the rule of perpetuity cannot be applied to a covenant of preemption. The agreement creating a preemptive right in favour of co-owners to sell the land to him as and when the transferee would seek to alienate his share in the lands to third parties becomes a contract between the parties and the same would not amount to a prohibition on the transferee's right to alienate the land to anybody. Therefore, it is enforceable as and when an attempt is made by the co-sharer to alienate the land to third parties. It was held that the rule of perpetuity has no application to the facts in that case. In *AIR 1932 158 (Privy Council)* , the Privy Council held that the condition in a family arrangement that the property should not be alienated to a stranger is not repugnant to law. It was held that where a person has been allowed to take the property upon the expression agreement that it shall not be alienated outside the family, those who seek to make title through a direct breach of this agreement can hardly support their claim by an appeal to the high sounding principles such as justice, equity and good conscience.

15. Applying the above principles, we find that Ex.A.1 is a partition deed between the brothers and Clause 5 allots various schedules of properties absolutely to them, subject to the condition attached to the properties under Item 1 of the "B" schedule and Item 54 of the "D" schedule. The intention of the parties is clear to the effect that if these schedules of properties are alienated to third parties, it may not be possible for the respective sharers to enjoy the properties conveniently. From the evidence of P.W.1, it is seen that of the 20 cents of land, the plaintiff was allotted 10 cents under Ex.A.1. A small portion on the northern side of the suit property had already been acquired by the Railways. On the western side of the suit property, the plaintiff was allotted a portion of that

building. The suit property lies to the east of the said property. Plaintiff was allotted the property in the "B" schedule under Ex.A.1. The property in the "B" schedule has been described as S.No.1679/2740, whereas the property in the "D" schedule is of the same number on the eastern side building and half of the gate portion of an extent of 10 cents undivided. From the records and the evidence of P.W.1, it is clear that the suit property of an extent of 10 cents forms part of a contiguous building allotted to the plaintiff as well as defendants 2 to 4. In the light of the said allotment, it appears that the parties have thought it fit to incorporate a clause that in case the allottee of the properties in the "B" and "D" schedules found it necessary to alienate the properties, they have to first offer them to the other sharers. The value of the property will depend upon the market value. The expression, "nkw;go fpiuahPjp mDrhpj;J bfhLf;f ntz;oaJ" could only mean that taking into account the sale value shown, the market value can be fixed. The amount of Rs.10,000/- shown as the value could only be a guideline for the probable value of the property. The clause did not specify that the parties are bound by the said amount of Rs.10,000/- fixed in Clause 5 as the value of the property. Therefore, we are of the view that the said clause is for the beneficial enjoyment of the shares by the parties and the properties conveyed thereunder and is not an absolute restraint and therefore, is not invalid. Clause 5 is very clear and is recited clearly in detail without giving any room for ambiguity. The finding of the court below that the said clause is an absolute restraint and that there is uncertainty in the said clause cannot, therefore, be sustained.

16. From the facts of the case, it is seen that defendants 2 to 4 are fully aware and conscious of the said clause as evidenced by Ex.A.3, agreement dated 26.2.1979. This sale agreement refers to the allotment of the property to the defendants under Ex.A.1. Clause 5 of Ex.A.3 says that there is a condition imposed on them as well as on the plaintiff in reference to the alienation of the property. It is stated that they will obtain a release of the said condition or a written permission from the plaintiff. Clause 6 further says that in case the plaintiff refuses to give any written release or permission, they undertake to initiate appropriate proceedings in the court to cancel the said condition. Therefore, it is crystal clear that defendants 2 to 4 and the first defendant, while entering into the agreement, were fully conscious of the restriction imposed under Ex.A.1.

17. The first defendant had filed a suit O.S. No.48 of 1979 for specific performance of the said sale agreement. In the plaint to the suit, it is stated that the fifth defendant, namely the plaintiff herein, is the owner of the property adjacent and west of the plaint schedule property and that there is no boundary wall in between the plaint schedule property and the adjacent western property. According to the plaint averments, defendants 1 to 3, namely the vendors, have agreed to construct the said boundary wall before the sale deed was executed. The suit was decreed ex parte and the plaintiff herein got it set aside. As against this, the first defendant herein filed C.R.P. No.3325 of 1980, which was dismissed on 20.7.1981. Thereafter, the first defendant filed SLP No.5903 of 1982. The

order in the C.R.P. was confirmed and the SLP was dismissed. But, however, the following observation was made by the Honourable Supreme Court in its order dated 30.8.1982 :

"Special Leave Petition is dismissed. It will be open to the petitioner to apply to the trial court either for deleting the name of the fifth defendant or for stating that he does not wish to claim any relief against the fifth defendant."

Thereafter, the first defendant filed an application I.A. No.420 of 1982 in O.S. No.43 of 1972 stating that he does not wish to proceed against the fifth defendant (plaintiff herein) and that his name must therefore be deleted from the proceedings in the suit in which a substantial claim has been made only against defendants 2 and 3. The trial court dismissed the application by order dated 3.9.1983. Thereafter, the first defendant filed C.R.P. No.4546 of 1983 before this Court and the learned Judge allowed the revision holding that the plaintiff (first defendant herein) has already got a decree, though ex parte, against the person who entered into the agreement of sale. But, that decree cannot be effected at the instance of the fifth defendant in these proceedings. If the fifth defendant has any independent right against the plaintiff, that will have to be agitated by him in an independent suit. Hence, the order of the trial court was set aside and the fifth defendant was discharged from the proceedings in the suit. However, this Court made the position clear in the following words :

"This will, however, not affect the right of the fifth defendant (plaintiff herein) to proceed against the plaintiff, if so advised, in his own right, to enforce any right which he may claim in respect of the same property. This will, of course, be subject to the objection which the present plaintiff is entitled to take on the ground of limitation or any other ground permissible to him."

18. In the meanwhile, the second defendant had executed a sale deed dated 4.8.1977 in favour of the first defendant regarding his right in the property. The date of the sale was not revealed to the plaintiff when the suit was filed on 4.2.1983. In the first written statement filed by the first defendant dated 16.7.1983, he has only stated to the effect that the second defendant, on 4.8.1977, received Rs.29,100/- towards sale consideration and executed the sale deed in favour of the first defendant in respect of his share in the property. No particulars were stated about the sale deed. However, in the amended written statement filed on 8.1.1986, nearly after three years, the first defendant has revealed the date of the sale as 4.8.1977. The said document has been produced by the defendant as Ex.B.4. A perusal of the document shows that by including a mortgage in reference to two cents of land at Sengal Pasalai, Neyyatrakarai, Thiruvananthapuram, the suit property was conveyed and registered in the Sub Registrar Office at Amaravilai, Kerala State. The said document is written in Malayalam language. It is admitted that defendants 1 to 4, who are fully aware of the condition stipulated in Ex.A.1 regarding alienation, as is evident in the agreement for sale, have not chosen to issue any notice either before the purchase of the property or subsequent to it. No suit notice had been issued to

the plaintiff before the filing of the suit for specific performance or subsequently. On the other hand, he obtained an ex parte judgment and when it was set aside, he had chosen to file an application to delete the name of the plaintiff as a party arrayed. Therefore, it is clear that the first defendant as well as defendants 2 to 4 kept their dealings a secret and they have executed the agreement as well as the sale deed with the second defendant at the back of the plaintiff. The fact that the sale deed was registered in Kerala by including a small portion of property as mortgage only reveals that defendants 1 to 4 did not want the plaintiff to know about the transactions.

19. The plea of the defendant is that the suit for preemption is not filed within one year and that the suit is barred by limitation inasmuch as the suit is filed more than one year after 4.8.1977, the date of the sale deed in favour of the first defendant. The trial court, on both these grounds, held against the plaintiff. From the admitted facts, it is seen that the suit property is in possession of the fifth defendant who is the tenant. Ex.A.1, partition deed itself mentions under Clause 6 that the property is in the hands of the tenant and that there is already an application pending before the Rent Controller and further directions are given in that clause as to how the matter has to be proceeded with. The fifth defendant has taken a stand that the total area comprised in the plaintiff's property is 20 cents, but excluding the area acquired by the Railways, there is a balance of 15 cents, and in this site and building, the plaintiff is entitled to one half share and defendants 2 to 4 are entitled to another half share. According to him, he is not aware of the agreement of sale alleged to have been executed by defendants 2 to 4 in favour of the first defendant and the sale deed executed by the second defendant. It is further stated that the fifth defendant is running a business in the plaintiff's scheduled building ever since 1935 and that he is also a mortgagee of the suit property. Therefore, the property in question is not capable of physical possession. Article 97 of the Limitation Act, 1963 says that the period one year is to begin when the purchaser takes under the sale, physical possession of the property sold; or where the subject matter of the sale does not admit physical possession, when the instrument of sale is registered. It is not the case of the parties that physical possession cannot be taken in this case. Therefore, Article 97 of the Limitation Act is not attracted in this case.

20. In *Sukhnandan Singh, etc. Vs. Jamiat Singh and Others*, the Supreme Court held that the properties in possession of the tenant will be incapable of physical possession which means personal and immediate possession. A Division Bench of the Nagpur High Court, in *SHEONANDANPRASAD VS. KANHNIYALAL* AIR 1956 Nag 243, held that in applying Article 10 of the Limitation Act (1908), the matter must not only fall under the first column, but also under the third, and if the third column cannot be attracted, Article 10 goes, however much the right may be the kind of right which the first column contemplates. There is no scope for piecemeal application of column 3. Either the property sold, the whole of it, admits of physical possession or it does not. If it does, the first part applies. If it does not and there is a registered document, the second part would apply. But, if

the property neither completely falls under the first part nor under the second, the case is taken out of the category of Article 10 (present Article 97 under the 1963 Act).

21. The contention of the counsel for the appellants is that the suit is filed within time and Article 54 of the Limitation Act applies to the facts of the case and that the first respondent is disentitled from raising the plea of limitation. He has also relied on Section 17 of the Limitation Act contending that the period of limitation shall not begin to run until the plaintiff has discovered fraud. In this case, the document was concealed and until the first respondent has stated in his additional written statement about the registration of the said sale deed, the limitation will start running only from that day.

22. As stated earlier, the first defendant was fully aware of the preemption clause and had insisted on getting a permission or release or an order of the court. The further facts are that without notice to the plaintiff the document had been registered in Kerala and the particulars of the document were not made available to the plaintiff; there was no suit notice to the plaintiff intimating the sale deed, and for the first time only in the amended written statement filed by the first defendant dated 8.1.1986, after nearly three years of the filing of the original written statement, the date of the sale deed is mentioned as 4.8.1977. Therefore, it is a clear case that the first defendant and defendants 2 to 4 have colluded to bring about the sale deed in order to defeat the rights of the plaintiff. The circumstances set out above would clearly indicate that defendants 1 to 4 have acted in concert with full knowledge and to defeat the valuable right of the plaintiff. Hence, the question of filing the suit within one year as per Article 97 of the Limitation Act will not arise in this case.

23. In *Sheo Shanker Upadhyaya and Others Vs. Partab Narain Singh and Others*, , in a similar case, the Allahabad High Court held that if a vendor or a vendee wishes that the sale should not be nullified by a preemption suit, it is necessary for him to inform the preemptor before the transaction and get his refusal, but a mere omission to inform the preemptor or the bare fact of concealing the sale transaction from him cannot amount to fraud, but where there is an active concealment of the transaction coupled with an intention to deceive the preemptor, there would undoubtedly be a fraud within the meaning of Section 18 of the Limitation Act. In *Jagdish Rai and Another Vs. Suraj Kumar Singh and Others*, , which is another similar case, a small portion of land in another Tahsil was included in sale deed along with the property over which the preemptor had a right of preemption. The sale deed was registered in such other Tahsil in order to conceal the fact of the sale from the preemptor, the vendee not applying for mutation, neither getting possession nor recovering the rent till after one year from the registration. It was held, in that case, that the preemptor was entitled to exclusion of such property and that the vendees were guilty of fraudulent concealment of the fact of sale and hence, the preemptor, while filing a suit for preemption, was entitled to exclude the time during which he was so kept out of

knowledge of the sale deed, following the decision in Sheo Shanker Upadhyaya and Others Vs. Partab Narain Singh and Others, . In Syed Shah Ghulam Ghouse Mohiuddin and Others Vs. Syed Shah Ahmed Mohiuddin Kamisul Quadri (Died) by Lrs. and Others, , it was held by the Supreme Court that Section 18 of the Limitation Act, 1908 provides that when a person having a right to institute a suit has, by means of fraud, been kept from knowledge of such right or of the title on which it is founded, the time limit for instituting the suit against the person guilty of the fraud shall be computed from the time when the fraud first became known to the person affected thereby. Their lordships followed the decision in RAHIMBOY VS. TURNER (1893) 20 Ind A 1 wherein it was held, "When a man has committed a fraud and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute fraud, at a time which is too remote to allow him to bring the suit."

24. In this case, the plaintiff came to know of the sale deed only in the year 1986 inasmuch as it is admitted that defendants 1 and the other defendants 2 to 4, knowing fully well of the preemption clause, had taken a sale deed in a different State and avoided the registration of the sale within the jurisdiction of the registration office where the property is situated or the parties permanently reside and that no notice of any kind was issued to the plaintiff. Even after the filing of the written statement, the particulars were not given and only in the amended written statement, the date of the sale deed was given. Further, the first defendant, in his suit for specific performance, has given up the plaintiff as not a necessary party, after having lost to get the ex parte decree confirmed. Therefore, it is a clear case of fraud and the first defendant has got the property in that manner and the defendants have miserably failed to show that the plaintiff had knowledge of the sale. On the contrary, the plaintiff has established that he had no information of the sale deed and that the same was executed in secrecy in order to deprive him of his rights.

25. A Division Bench of this court, in M. Mohamed Kassim and Others Vs. C. Rajaram and Others, , referred the taking of a sale deed in a different place as an important circumstance showing the fraudulent intention. In that case, the sale deeds were registered at Patasalai in Kerala after including an item of property situated in Kerala, to which the first defendant had absolutely no right, even though the suit properties were situated in Tamil Nadu. This was done with a view to maintain secrecy of the sale deed so that he can secrete the amount and defeat the rights of his creditors. The facts in the case on hand are also similar. Therefore, this is one of the crucial circumstances to show the intention of the defendants to commit fraud against the plaintiff. The decisions referred above would support the case of the plaintiff that the suit is not barred by limitation. The sale deed taken by the first defendant is void and illegal and has to be ignored.

26. For all the reasons stated above, we hold that the appellants are entitled to a

decree for redemption in the mortgage as well as a decree for possession of property by way of preemption. The appellants are directed to deposit the mortgage amount and a sum of Rs.69,000/-, the sale consideration to respondents 2 to 4 and respondents 2 to 4 shall execute the sale deed in favour of the appellants, and on their failure and on the appellants depositing Rs.69,000/-, the court shall execute the sale deed in respect of the suit property. The appeal is accordingly allowed with costs.